

generated EPGs. Such a requirement already exists in the open video system (“OVS”) regulations. The OVS rule (1) prohibits OVS operators from unreasonably discriminating in favor of themselves or their affiliates in providing material or information (including advertising) for use by subscribers in selecting programming; (2) requires OVS operators to ensure that providers are able “suitably and uniquely” to identify their programming services to subscribers; and (3) requires OVS operators to transmit, “without change or alteration,” programming information transmitted as part of a programming provider’s signal.⁴⁰

Drawing on the OVS model, the Commission should adopt cable rules that (1) prohibit cable systems from excluding any local broadcast station from—or from otherwise discriminating against any local broadcast station in—any EPG or navigation device provided by the system and (2) require cable systems to provide an EPG that contains a non-discriminatory listing of all programming services available on the system. The non-discrimination requirement would simply require cable systems to organize their EPGs according to neutral principles that do not have the effect of placing broadcast stations in a disadvantageous position in the EPG. The rule should also provide that if a cable EPG is organized according to the “neutral principle” of programming source, local broadcasters must be grouped on the first page of the EPG, or its equivalent.

those cases, the EPG should not be permitted to hinder consumer access to broadcast signals.

⁴⁰ See 47 C.F.R. § 76.1512.

IV. THE COMMISSION SHOULD PERMIT BROADCASTERS TO MAKE SEPARATE MUST-CARRY/RETRANSMISSION CONSENT ELECTIONS FOR THEIR ANALOG AND DIGITAL SIGNALS.

The relationships between broadcasters and cable systems will be shaped in significant measure by the Commission's resolution of the question of how, as a procedural matter, broadcasters can make elections concerning whether their digital signals will be carried pursuant to applicable must-carry obligations or pursuant to retransmission consent. In the analog world, broadcasters are required to make an election every three years for their NTSC stations.⁴¹ The next election will be made in October 1999 and effective in January 2000. As digital stations begin to come on line, the question arises whether broadcasters should be permitted to make *separate* must-carry/retransmission consent elections for each digital and analog channel, or whether they should be required to choose retransmission consent or must-carry for their two channels as a package.⁴² In addition, if the Commission permits separate elections, it must determine whether the elections will take place on concurrent or separate cycles.

The Broadcast Group believes that broadcasters should be permitted to make separate must-carry/retransmission consent elections for each of their analog and digital transmissions. The business and technical circumstances relating to cable carriage of analog and digital signals are radically different, as are other factors that will influence broadcasters' decisions with respect to retransmission consent or must-carry for the two channels. Nothing in the statute requires that these different positions and concerns be considered and resolved in a single retransmission consent election or negotiating session,

⁴¹ 47 U.S.C. § 325; 47 C.F.R. § 76.64.

⁴² Notice, ¶ 34.

and there is no reason for the Commission to narrow broadcasters' options with respect to their elections for their analog and digital channels. Allowing separate elections will give broadcasters maximum flexibility in determining how their new digital signals will be transmitted to the public. Broadcasters and cable operators would still be free to negotiate simultaneously for carriage of the analog and digital channels if they so desire; they simply should not be required to do so.

To avoid the administrative burden on broadcasters and cable operators of frequent must-carry/retransmission consent elections and negotiations and to afford broadcasters and cable operators the freedom to negotiate simultaneously with respect to both the analog and digital channels if they so choose, broadcasters' carriage elections should take place on concurrent cycles. Thus, the election cycle for DTV channels, like the next analog election cycle, should begin in October 1999 (or as soon as the DTV station goes on the air), become effective in 2000, and run concurrently with the analog cycle until 2003.

V. THE COMMISSION SHOULD ADOPT A MUST-CARRY RULE THAT ENSURES CONSUMERS' ACCESS TO DTV WITHIN A REASONABLE TIME BUT DOES NOT IMPOSE AN UNDUE BURDEN ON CABLE OPERATORS.

Although the Broadcast Group is filing these comments primarily to emphasize the importance of the early resolution of many of the non-must-carry issues involved in this proceeding, its members nonetheless urge the Commission to embrace the significance of must-carry requirements as a prerequisite to the success of the DTV transition. Broadcast Group members, like other broadcasters, will invest millions of dollars in the development of DTV facilities to comply with Congress's and the Commission's mandate to transition to digital and return their analog spectrum expeditiously. The

Broadcast Group's members remain convinced that the transition to digital will permit them to explore many television services that can exist only in the digital environment, and thereby to compete more effectively by offering new services to the public. However, the Broadcast Group members know from their experience in the analog environment that their investments in digital programming will prove futile, and the transition to digital will falter, if the stations are denied access to the significant portion of the audience receiving cable service.⁴³

The Broadcast Group supports the prompt adoption of must-carry requirements for local digital broadcast signals. We think it clear that the Commission has no discretion to refuse to adopt must-carry requirements expeditiously. The Communications Act requires the Commission "to initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary *to ensure cable carriage* of [advanced] broadcast signals of local commercial television stations which have been changed to conform to [the advanced] standards."⁴⁴ The purpose of this provision is to ensure that advanced television signals are carried "in accordance with the objectives" of Section 614,⁴⁵ which are to preserve the local broadcast service and to prevent anti-competitive behavior by cable operators.⁴⁶

⁴³ Congress itself has acknowledged that the ultimate success of the digital transition depends to a certain extent on the degree of penetration of digital broadcast signals into cable homes. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3003, 111 Stat. 251, 265-66 (codified at 47 U.S.C. § 309(j)(14)(B)).

⁴⁴ 47 U.S.C. § 534(b)(4)(B) (emphasis added).

⁴⁵ 1992 Cable Act Conference Report, at 67, reprinted in 1992 U.S.C.C.A.N. at 1249.

⁴⁶ See *id.* at 75, reprinted in 1992 U.S.C.C.A.N. at 1257; 1992 Cable Act Senate Report, at 45-46, reprinted in 1992 U.S.C.C.A.N. at 1178-79.

The objectives of Section 614 clearly will not be advanced without some Commission action on digital must-carry. Cable systems' market power and control over the delivery of video service, combined with the cable industry's vertical integration, gives cable systems both the capacity and incentive to favor cable programming over local broadcast signals. These circumstances necessitated the enactment of the 1992 Cable Act, and they remain present today in the digital context. Congress's 1992 conclusion that "[m]ust-carry and channel positioning rules are the only means through which local broadcasters can secure access to cable subscribers" remains true.⁴⁷

Indeed, these concerns appear to be particularly relevant with respect to the carriage of DTV signals. There is considerable evidence that cable operators are unwilling even to discuss the possibility of voluntary cable carriage of digital broadcast signals.⁴⁸ It seems clear to us that the success of digital television, and the ability of local broadcasters to serve their communities, are riding on the establishment of a pervasive cable carriage requirement, and we urge the Commission to adopt a must-carry rule that will establish concrete carriage obligations and provide some certainty to local broadcasters as they move forward with the digital transition.

Despite our support for the prompt adoption of a digital cable carriage requirement, the Broadcast Group recognizes that the Commission must take into account the legitimate concerns of cable operators about cable carriage obligations that could force

⁴⁷ 1992 *Cable Act Senate Report*, at 45, reprinted in 1992 U.S.C.C.A.N. at 1178.

⁴⁸ See, e.g., HDTV: Hearing Before the Senate Comm. on Commerce, Science & Transportation, 105th Cong. (July 8, 1998) (statement of Elizabeth Murphy Burns); Paige Albinak, "No Must, No Fuss: Big Four Broadcast Networks, Cable Operators Seem in Sync on Will Carry," *Broadcasting & Cable*, Apr. 27, 1998, at 4 (noting that independent stations and smaller networks have not been included in network-cable negotiations on carriage).

the removal of popular cable programming. Accordingly, we think it inevitable that the must-carry regime the Commission adopts should take effect on a staggered, case-by-case basis as cable systems add capacity to their systems. For that reason, we support the proposal presented by the Association for Maximum Service Television, in comments filed in this proceeding today, for a capacity-based phase-in of cable carriage obligations.

A capacity-based must-carry rule should require cable systems to carry local digital broadcast signals on unused capacity or on new capacity that is added in the future, but for the most part should not require cable systems to delete existing cable programming to make room for local digital signals. That is, cable systems that are upgrading or have recently upgraded to a specified capacity (for example, 750 MHz) should be presumed to be able to utilize their capacity to carry local digital broadcast signals that qualify for carriage under the existing rules (*e.g.*, full-power stations that serve the cable system's community and provide a good quality signal at the cable system's principal headend). Cable systems that upgrade in the future to that (or some other) level should be required to provide a portion of their new capacity, up to the one-third statutory cap, for local digital broadcast signals. If all digital signals that would ultimately be eligible for carriage are not on the air when capacity is added, a cable system could utilize the capacity that has been set aside for local signals for cable programming. But cable programming on the set-aside channels would be subject to preemption by local digital broadcast signals as they come on-line.

The rules should address cable systems that have not upgraded for a long time and that fail to upgrade for a significant period of time even after most digital signals are on the air. Such situations likely would be avoided if the capacity-based rules include a provision that sets a date certain by which time all cable systems will become subject to the

obligation to carry all qualified local commercial broadcast stations up to the one-third cap. This should give cable operators sufficient warning that they must upgrade their systems to avoid having to bump cable programming. If such systems fail to upgrade, however, they should nonetheless be required to carry all qualified digital broadcast stations up to the cap.

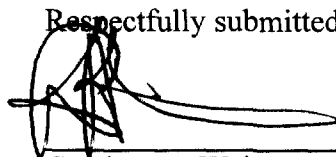
We believe that a capacity-based rule, with incentives and requirements for upgrade, is a fair and flexible proposal that would take into account cable operators' concerns that they not be required to delete popular programming and broadcasters' need to have some assurance that they will be carried on cable early in the DTV transition. Such a rule preserves the public's interest both in a swift transition to DTV and in stability in the programming it has come to expect from cable systems. Such a rule also prevents cable systems from discriminating against local broadcasters, to the detriment of the public interest, by adding cable capacity (often digital) and filling it with cable programming while excluding local digital signals.

VI. CONCLUSION.

In accordance with the foregoing, the Broadcast Group urges the Commission to adopt rules governing the *characteristics* of digital cable carriage as expeditiously as possible to provide a much-needed regulatory background against which broadcasters can roll out digital broadcast television services. The rules should preserve the integrity of local markets and the principle of localism in television broadcast service; encourage the development of diverse new digital programming services; and discourage cable operators from engaging in anti-competitive conduct against digital broadcasters. The Commission should also permit broadcasters to make separate must-carry/retransmission consent

elections for their analog and digital signals. Finally, the Commission should adopt, as soon as possible, a flexible, capacity-based must-carry requirement that will ensure cable carriage of digital signals within a reasonable time but will not unduly burden cable systems.

Respectfully submitted,



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Dated: October 13, 1998

APPENDIX A THE BROADCAST GROUP STATIONS

Benedek Broadcasting Corp.

KAUZ-TV (CBS), Wichita Falls, TX
KCOY-TV (CBS), Santa Maria, CA
KDLH(TV) (CBS), Duluth, MN
KGWC-TV (CBS), Casper, WY
KGWR-TV, Rock Springs, WY*
KGWL-TV, Lander, WY*
KGWN-TV (CBS), Cheyenne, WY
KSTF(TV), Scottsbluff, NE*
KTVS(TV), Sterling, CO*
KHQA-TV (CBS), Quincy, IL
KMIZ(TV) (ABC), Columbia, MO
KOSA-TV (CBS), Odessa, TX
WBKO (ABC), Bowling Green, KY

WHOI(TV) (ABC), Peoria, IL
WHSV-TV (ABC), Harrisonburg, VA
WIBW-TV (NBC), Topeka, KS
WIFR(TV) (CBS), Rockford, IL
WILX-TV (NBC), Lansing, MI
WMTV(TV) (NBC), Madison, WI
WSAW-TV (CBS), Wausau, WI
WTAP-TV (NBC), Parkersburg, WV
WTOK-TV (ABC), Meridian, MS
WTRF-TV (CBS, ABC), Wheeling, WV
WTVY-TV (CBS), Dothan, AL
WWLP(TV) (NBC), Springfield, MA
WYTV(TV) (ABC), Youngstown, OH

Chronicle Publishing Co.

KRON-TV (NBC), San Francisco, CA
WOWT(TV) (NBC), Omaha, NE
KAKE-TV (ABC), Wichita, KS

KLBY(TV), Colby, KS*
KUPK-TV, Garden City, KS*

Draper Communications, Inc.

WBOC(TV) (CBS), Salisbury, MD

KGBT-TV (CBS), Harlingen, TX

LIN Television Corp.

WAVY-TV (NBC), Portsmouth, VA
KXAN-TV (NBC), Austin, TX
KXAM-TV, Llano, TX*
WOOD-TV (NBC), Grand Rapids, MI
WISH-TV (CBS), Indianapolis, IN

WANE-TV (CBS), Fort Wayne, IN
WIVB-TV (CBS), Buffalo, NY
WTNH-TV (ABC), New Haven, CT
WAND(TV) (ABC), Decatur, IL

Midwest Television, Inc.

WCIA(TV) (CBS), Champaign, IL
WCFN(TV), Springfield, IL*

WMBD-TV (CBS), Peoria, IL
KFMB-TV (CBS), San Diego, CA

Paxton Media Group, Inc.

WPSD-TV (NBC), Paducah, KY

Raycom Media, Inc.

KFVS-TV (CBS), Cape Girardeau, MO
KNDO-TV (NBC), Yakima, WA
KNDU(TV), Richland, WA*
KOLD-TV (CBS), Tucson, AZ
KSFY-TV (ABC), Sioux Falls, SD
KABY-TV, Aberdeen, SD*
KPRY-TV, Pierre, SD*
KSLA-TV (CBS), Shreveport, LA
KTVO(TV) (ABC), Kirksville, MO
KWWL(TV) (NBC), Waterloo, IA
WACH(TV) (Fox), Columbia, SC
WAFB(TV) (CBS), Baton Rouge, LA
WAFF(TV) (NBC), Huntsville, AL
WDAM-TV (NBC), Laurel, MS
WECT(TV) (NBC), Wilmington, NC
WLUC-TV (NBC/ABC), Marquette, MI

WMC-TV (NBC), Memphis, TN
WPBN-TV (NBC), Traverse City, MI
WTOM-TV, Cheboygan, MI*
WSTM-TV (NBC), Syracuse, NY
WTNZ(TV) (Fox), Knoxville, TN
WTOC-TV (CBS), Savannah, GA
WTVM(TV) (ABC), Columbus, GA
WTVR-TV (CBS), Richmond, VA
WUPW(TV) (Fox) Toledo, OH
WFLX(TV) (Fox), West Palm Beach, FL
WNWO-TV (NBC), Toledo, OH
WXIX-TV (Fox), Newport, KY
WOIO(TV) (CBS), Shaker Heights, OH
WLII(TV) (Ind.), Caguas, PR
WSUR-TV, Ponce, PR*

Spartan Communications, Inc.

WSPA-TV (CBS), Spartanburg, SC
WNEG-TV, Toccoa, GA*
WBTW(TV) (CBS), Florence, SC
KIMT(TV) (CBS), Mason City, IA
WMBB(TV) (ABC), Panama City, FL
WJBF(TV) (ABC), Augusta, GA

WRBL(TV) (CBS), Columbus, GA
WKRG-TV (CBS), Mobile, AL
KWCH-TV (CBS), Wichita, KS
KBSD-TV, Ensign, KS*
KBSH-TV, Hays, KS*
KBSL-TV, Goodland, KS*

* Denotes satellite of preceding station.